No. 2437.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

UTAH IMPLEMENT-VEHICLE COMPANY, A CORPORATION,
Appellee,

VS.

D. W. STANDROD & COMPANY, A CORPORATION, AS TRUSTEE FOR IDAHO LUMBER COMPANY, LTD., AND GEO. A. LOWE COMPANY, CORPORATIONS,
Appellant.

BRIEF OF APPELLEE

Appeal from the District Court of the United States for The District of Idaho, Eastern Division.

CLENCY ST. CLAIR,
CHARLES C. ST. CLAIR,
Attorneys for Appellee.

REGISTER PTG. AND PUB. CO. IDAHO FALLS

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Filed....., 1915.

.....Clerk.

STATEMENT.

May It Please the Court:

The statement in the brief for appellant that the defendant Frank C. Bowman, as Trustee for N. C. Mickleson, bankrupt, did not answer in the action, is not correct. The transcript does not show an answer, but it does not show that he did not answer, and as a matter of fact, he did file an answer to plaintiff's complaint.

The defendant, D. W. Standrod & Company, was defendant in this case as Trustee for Idaho Lumber Company, Geo. A. Lowe Company, E. E. Rodgers and F. C. Rodgers. The Trustee filed a joint answer as Trustee for all four of those for whom it was made a defendant as Trustee and the decree awarded a first lien upon the property under the Rodgers mortgage to the defendant, D. W. Standrod & Company, as Trustee for all four of the beneficiaries.

This appeal is prosecuted by D. W. Standrod & Company as Trustee for Idaho Lumber Company and Geo. A. Lowe Company only, and on behalf of E. E. Rodgers and F. C. Rodgers a sererance was granted by the lower Court permitting an appeal by the Trustee on behalf of the Idaho Lumber Company and Geo. A. Lowe Company.

The decree of the trial Court awarded a first lien upon the Shelley property to D. W. Standrod & Company as Trustee for its four benefiiciaries under the Rodgers mortgage, as purchaser at the foreclosure sale held under the decree rendered in the five suits to foreclose mechanic's lien and the one suit to foreclose the Rodgers mortgage. All six of the actions having been consolidated. The Court awarded a second lien upon the Shelley property to the plaintiff, Utah Implement-Vehicle Company and awarded nothing to D. W. Standrod & Company, as Trustee, as purchaser at the foreclosure sales under

the five mechanic's liens upon the ground, as shown by the Court's opinion, that the Utah Implement-Vehicle company not being a party defendant in the suits to foreclose the mechanic's liens and the Rodgers mortgage, was in no way bound thereby and that the mechanic's liens were barred under the provision of the Idaho Statutes as against the Utah Implement-Vehicle Company's mortgage by reason of suit to foreclose, such liens not having been brought against the Utah-Implement Vehicle Company within six months from the time of filing such liens.

On the day of trial and just prior thereto, the defendant Standrod & Company, as Trustee, submitted a supplemental pleading asking that an order entered into in the Bankruptcy proceeding, in the estate of N. C. Mickleson, bankrupt, permitting the Trustee to dismiss a former suit which had been brought by F. C. Bowman, as Trustee of the bankrupt, against the Utah Implement-Vehicle Company to set aside its mortgage as a preference, be vacated and set aside and asking the Court in this action to direct Bowman, as Trustee, to prosecute such action to final judgment or permitting D. W. Standrod & Company, as Trustee, to prosecute such action and asking that proceedings in this action be stayed pending the determination of such issues. To this supplemental pleading, the defendant, Bowman as Trustee, filed an answer and the trial Court, upon the hearing of the supplemental pleading, denied the relief prayed for in the supplemental pleading of D. W. Standrod & Company, as Trustee.

ARGUMENT.

The brief for appellant groups the first eight assignments of error under the one proposition as to whether a lien claimant under the Idaho Mechanic's lien laws must commence his foreclosure action within six months against a person claiming a subsequent mortgage lien.

The provisions of the Idaho statutes, which we believe affect the question proposed in appellant's brief, are as follows:

"Sec. 5118. No lien provided for in this chapter binds any buildings, mining claim, improvement or structure for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper Court within that time to enforce such lien; or, if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force under this chapter for a longer period than two years from the time the work is completed, or credit given, unless proceedings to enforce the same shall have been commenced."

"Sec. 5113. The land upon which any building, improvements or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, * * * "

"Sec. 5124. Except as otherwise provided in this chapter, the provisions of this Code, relating to civil actions, new trials and appeals, are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter: Provided, That the District Courts shall have jurisdiction of all actions brought under this chapter."

Our contention is, and the trial Court held, that Idaho Code Section 5118, properly construed, means that the proceeding to foreclose the lien must be brought against

the owner and all encumbrancers by mortgage or otherwise against whom relief is sought, or it is desired to have the decree bind.

We do not understand that it is seriously contended for appellant that a junior mortgagee is bound by a decree in a mechanic's lien foreclosure unless he is a party thereto, and we believe that aside from the case of Cornell vs. Conine-Eaton Lumber Company, 47 Pac. 912 (Colo.) none of the cases hold that the junior mortgagee is bound by the decree unless he is made a party to the suit.

Sec. 397 of Phillips on Mechanic's Liens, is cited as holding that a mortgagee is not an owner within the meaning of the Mechanic's Lien law, and need not be made a party defendant, but an examination of Mr. Phillips' works will show that this statement is made merely as being the effect of a statute requiring only the owner to be made a defendant.

Mr. Phillips at Section 399 of his work on Mechanic's Liens, states the rule, where a suit to enforce a mechanic's lien is practically a chancery proceeding, to be that subsequent mortgages are necessary parties to foreclose their interests and that when the remedy provided is in the nature of an equitable proceeding to foreclose the lien, in analogy to the practice upon the foreclosure of a mortgage, with a view to the sale of fee-simple of the mortgaged premises, it would seem that all persons having a claim to have a lien thereon at the time of the commencement of the suit should be made parties.

The Supreme Court of Idaho has held in the case of Jensen vs. Bumgarner, 25 Idaho 355, that an action to foreclose a mechanic's lien is an action in equity.

The case of Whitney vs. Higgins, 10 Cal. 547, cited by appellant, expressly decides that if encumbrancers are not made parties to an action to foreclose a mechanic's

lien, they are not bound by the decree or the proceedings thereunder, and that an encumbrancer must be made a party, otherwise his rights will not be affected.

The case of Gaines vs. Childers, 63 Pac. 487 (Ore.) also cited by appellant, does not hold that the junior mortgagee need not be made a party defendant, but on the contrary, holds that in order to bind him by the decree, he must be made a party.

The conflict of authorities upon this question is not upon the question as to whether the junior mortgagee must be made a party defendant, in order to affect or bind him, but the conflict is as to the effect upon the lien itself, as against the junior mortgagee on account of the failure to make him a party. A few of the authorities, as pointed out in the opinion of Judge Dietrich, under statutes similar to the Idaho statutes, hold that while the junior mortgagee is not bound by the judgment, that the judgment in a mechanic's lien foreclosure, has the effect, in favor of the purchaser at a sale thereunder, of keeping the mechanic's lien alive indefinitely and thereby throwing upon the junior mortgagee the necessity of redeeming within the period permitted by the general statute of limitations, or if suit is brought for strict foreclosure of his right of redemption by the purchaser to require such junior mortgage to redeem within a short time to be fixed in the strict foreclosure action. The effect of those cases is that notwithstanding they hold in general terms that the junior mortgagee is not affected by the abortive foreclosure of the liens, that he is actually affected on account of the purchaser being given a longer time for foreclosure or asserting of his rights under the mechanic's lien, against the junior mortgagee, than the statute by its terms permit.

It is claimed that a Court of Equity will in a mortgage foreclosure, protect the rights of the purchaser in the

foreclosure sale as against a junior encumbrancer not made a party by keeping the lien of the mortgage alive, and a few of the authorities uphold this doctrine as to mortgage foreclosures.

In the brief for appellant, it is stated that it is not contraverted that a holder of a subsequent lien need not be made a party to the foreclosure of a prior mortgage, but we do not concede the truth of this statement, as we do not concede such a rule. In the argument in the lower Court, we conceded that the defendant, D. W. Standrod & Company, as Trustee, was entitled to a first lien for what was actually due under the Rodgers mortgage, notwithstanding the Utah Implement-Vehicle Company had not been made a party to the Rodgers foreclosure suit, but the concession was made on account of the fact that the Rodgers mortgage was not barred at the time of the trial of this case in the lower Court, and not because it was not necessary for them to make the Utah Implement-Vehicle Company a party defendant.

Even in mortgage foreclosures the authorities are uniform to the effect that the junior mortgagee is under no obligation to redeem, but that he may foreclose his junior mortgage as against a purchaser at a sale under a foreclosure of a prior mortgage if he was not made a party defendant to such foreclosure.

Catterlin vs. Armstrong, 79 Ind. 514.

Catterlin vs. Armstrong, 101 Ind. 258.

Memphis & L. R. R. Co. vs. State, 37 Ark. 632.

Anson vs. Anson, 20 Iowa 55.

Chilver vs. Weston, 27 N. J. Eq. 435.

Besser vs. Hawthorn, 3 Ore. 129.

Stewart vs. Johnson, 30 Ohio St. 24.

The Supreme Court of California in the case of Frates vs. Sears, 77 Pac. 905 (Cal.) is the only case we have been able to find wherein the effect on a first mortgage lien, of failure to make a junior mortgagee a party defendant, as regards the running of the statute of limitations against the first mortgage, is fairly and directly raised, considered and decided, and in that case the California Supreme Court held that "where a second mortgagee was not made a party to a suit to foreclose the first mortgage, and, at the time suit was brought to foreclose the second mortgage, the time limited by law for suing on the first mortgage had fully elapsed, the second mortgagee was entitled to plead the statute of limitations as a complete defense to any rights under the first mortgage."

Speaking of the decision in the case of Frates vs. Sears, supra, the Supreme Court of California in the case of Wemple vs. Yosemite Gold Mining Company, 87 Pac. 280 (Cal.) says: "In that case when the junior mortgagee who had not been made a party to the foreclosure of the senior mortgage brought his action to foreclose and made the senior mortgagee a party (who was the purchaser at his foreclosure sale) the latter failed in enforcing his prior lien because when he answered his mortgage debt had become barred by the statute of limitations. In the present case the senior mortgage was not barred when the answer was filed. The reasoning may go further, but the point decided in Frates vs. Sears was that the lien of the senior mortgagee is lost, if, when he asserts it against the foreclosure of the junior mortgage, his mortgage debt is barred."

The general rule as to the rights of a purchaser at a foreclosure sale under a first mortgage where a junior encumbrancer is not made a party defendant, is that the purchaser occupies no better position with respect to

the junior encumbrancer than if he had taken a deed from the mortgagor and an assignment of the first mortgage. The following cases are substantially to this effect:

Moulton vs. Cornish, 138 N. Y. 133.

Rodgers vs. Holyoke, 14 Minn. 220.

Sellwood vs. Gray, 5 Pac. 196 (*Ore.*)

Martin vs. Adams Brick Co. 102 N. E. 831 (*Ind.*)

The general statement of practically all the cases involving the question as to the rights of a junior encumbrancer not made a party to foreclosure of a first mortgage do not seem to take into consideration all of the questions that may arise, and the cases generally state that the junior mortgagee is not bound, if not made a party, but that he still has a right to redeem from the prior mortgage. The cases as we understand them do not go to the extent of holding that he must redeem from the prior mortgages whether there is a valid defense thereto, or not. The junior mortgagee would have a right to redeem from the prior mortgage if there had been no foreclosure, and, therefore, the effect of holding that he still has a right to redeem is equivalent to a holding that a foreclosure of a first mortgage without making him a party defendant, does not in any way affect his rights.

The reason that the question of statute of limitations against the lien of a purchaser at a foreclosure sale under a first mortgage, where the junior mortgagee is not made a party defendant, is not considered by many of the cases is, we think, because of the fact that in most of the cases the purchaser at foreclosure sale goes into the actual possession of the mortgaged property and becomes a mortgagee in possession before his mortgage is, in fact. outlawed and, therefore, it would do no good to plead the

statute of limitations because the statute does not run as against a mortgagee in possession.

As to mechanic's liens, even though it should be conceded that a prior mortgage does not outlaw as against a purchaser at a defective foreclosure sale, that ruling, if there is such a ruling, is a rule of equity which does not apply in a suit to foreclose a mechanic's lien, as there is no rule of equity which will keep a mechanic's lien alive after the expiration of the six months given by statute for its foreclosure. Section 5118 of the Idaho Code, expressly provides that the lien shall not bind the property for a longer period than six months after the claim has been filed. Unless proceedings be commenced in a proper Court within that time to enforce such lien, equity cannot step in and give vitality that the statute denies.

The Supreme Court of Indiana in the case of Deming-Colborn Lumber Co. vs. Union National Savings & Loan Association, 51 N. E. 936 upon this point, says:

"In other words the year given by statute having expired without a foreclosure of the lien as against the mortgage, the lien itself and the judgment based thereon must be, as to such mortgage, absolutely void. Equity cannot, as in the case of mortgages, maintain the senior lien on foot after the expiration of the year, when the statute declares it shall be void. By its foreclosure the lien holder not having made the mortgagee a party, simply stepped into the shoes of the owner of the property; and as such owner, could not question the right of the mortgagee to foreclose against the property, neither can the lien holder now do so—the year given him by statute to foreclose his lien having expired."

Section 9 of Phillips on Mechanic's Liens as to the nature of a mechanic's lien, says:

"A mechanic's lien is not property, or a right in or to property. It is neither a jus in re nor a jus ad rem. It

is simply a right to charge the property it affects, with the payment of a particular debt, in preference and priority to other debts, so far as the statute confers such preference, if all the requisitions of the statute are observed. Of itself, when the statutory requisitions to its creation are observed, it has not the force and effect of a judgment, and is not self-enforcing, or self-executing. Until a judgment is obtained, in the mode pointed out in the statute, it is incohate; and it is as dependant, for operation and effect, upon the rendition of a judgment, as the statute directs, as is the lien created by the levy of an attachment upon the rendition of a judgment in the attachment suit. It does not create even after being judicially established by judgment or decree, any privity of estate, or right of entry thereunder, * * * ''

Under the Idaho statutes above quoted, we contend that it was necessary within the statutory period of six months, for the mechanic's lien holders in this case to have brought their foreclosure actions making the Utah Implement-Vehicle Company a party defendant, and thereby giving notice to it of their claims of liens and giving to the Implement Company an opportunity, before too much time had elapsed, to defend against such liens and obtain evidence to support such defense.

In this particular case, it appears from the supplemental pleading filed on behalf of Bowman, as Trustee for the bankrupt, and by the report of sale made by the special master, that the mortgage of the Utah Implement-Vehicle Company is for a larger amount than the Shelley property is worth, after crediting the proceeds of sale of the farm property, and, therefore, Bowman as Trustee in bankruptcy, the sole defendant in the suits to foreclose the mechanic's liens, really had no interest in the property, and the Implement Company was really the only party to be affected by the foreclosures; yet, counsel

for appellant and a few of the cases upon the subject would require that the Implement Company be given only a right to redeem from the liens without an opportunity to defend against the same within the statutory period.

All of the mechanic's lien cases as to the question of statute of limitations, hereinafter cited, we believe, independent of questions of different statutory provisions, uphold our contention, but we call particular attention to the case of Deming-Colburn Lumber Company vs. Union National Savings & Loans Association, 51 N. E. 936 (Ind.), and the case of Davies vs. Bartz, 118 Pac. 334 (Wash.). In the latter case the Supreme Court of Washington holds:

"The only distinction, so far as here material between a necessary party and a proper party, is that a foreclosure of a lien without the one is absolutely void, while a foreclosure without the other is void only as to him."

The Court further says:

"It is the manifest purpose of this statute (a statute exactly similar to Section 5118 of the Idaho Code) to require the claimant to bring suit to establish his lien while the evidence upon which it rests is sufficiently recent to enable any party interested to successfully contest it, if the facts do not warrant the lien. The claimant must accord this opportunity within the time limited, or lose his lien. It is equally manifest that this right of contest is as valuable, and should be as available, to a mortgagee as to the owner. A mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority, if the evidence warrants either defense. He is entitled to his day in court upon these matters within the period fixed by the statute. In this respect, there is no valid distinction between necessary parties and proper parties."

In addition to the matters the junior mortgagee is interested in and entitled to being heard upon, as called attention to in the case of Davis vs. Bartz, supra, the junior mortgagee in Idaho is also entitled, under the provisions of Section 5113 of the Idaho Codes, to being heard upon and to have determined by the decree of foreclosure of a mechanic's lien the question as to how much of the land upon which the building is constructed shall be bound by the lien.

The case of Whitney vs. Higgins in 10 Cal. 547, cited by appellant, did not involve the question of whether the mechanic's lien which had been previously foreclosed without making the junior mortgagee defendant, was outlawed or not, as the sole question involved in that case was whether the common law right of redemption existed or the statutory right of redemption. The action was brought by the junior mortgagee for a decree permitting him to redeem and the junior mortgagee did not contend or claim that the mechanic's lien was outlawed, and that point is not touched upon in the opinion of the Court.

The case of Carpentier vs. Brenham, 40 Cal. 221, has some language in the opinion favorable to the contention of the appellant, but it is intimated in the opinion that the junior mortgagee having the right to redeem incidentally and growing out of his right to redeem, had a right to defend against the prior lien, by pleading the statute of limitations. This case was analyzed in the case of Frates vs. Sears, 77 Pac. 905 (Cal.) and the opinion in that case holds that if the Court in the case of Carpentier vs. Brenham meant to hold that the plaintiff could not plead the statute of limitations, they are inclined to doubt the logic of that opinion.

The case of De La Vergne Refrigerating Mach. Co. vs. Montgomery Brewing Co., 57 Fed. 111 (C. C. A. 5th Circuit), so much relied upon by appellant is directly in

point so far as the argument of the opinion as to the statute of limitations is concerned, but the entire opinion as to the statute of limitations is mere dictum as the Court in he latter part of the opinion holds that the amended bill making the mortgagees parties, was filed before the expiration of the six months allowed by statute after the debt became due for the foreclosure of the lien. As the statute of limitations had not run there was no such a question in that case.

We cite the following cases, which are also cited in the opinion of Judge Dietrich, as upholding our contention that the trial Court was right in holding that the mechanic's liens in this case were outlawed and that D. W. Standrod & Company, as Trustee, under its purchase at the foreclosure sale under said liens could not have a lien upon the Shelley property as against the mortgage of the Utah Implement-Vehicle Company:

Davis vs. Bartz, (Wash.) 118 Pac. 334.

Deming-Colborn &c vs. Union Nat'l &c., (Ind.) 51 N. E. 936.

Union Nat'l &c vs. Helberg, (Ind.) 51 N. E. 916.

Stoermer vs. People's Savings Bank (Ind.) 52 N. E. 606.

Green vs. Sanford (Neb.) 51 N. W. 967.

Ballard vs. Thompson (Neb.) 58 N. W. 1133.

Smith vs. Hurd, (Minn.) 52 N. W. 922.

Hakanson vs. Gunderson (Minn.)56 N. W. 172.

Falconer vs. Cochran (Minn.) 71 N. W. 386.

Dunphy vs. Riddle, 86 Ill. 22.

Crowl vs. Nagle, 86 Ill. 437.

McGraw vs. Bayard, 96 Ill. 146.

Jacks vs. Sullivan (Mo.)30 S. W. 890.

Badger L. Co. vs. Staley, (Mo.) 125 S. W. 799.

The opinion of Judge Dietrich set out in the transcript in this case at pages 64 to 76 inclusive, is very exhaustive, and fully covers the legal question involved, and we perhaps should not have gone to the trouble of seeking to add to that opinion by further argument.

NINTH ASSIGNMENT OF ERROR.

The claim that the Court erred in its refusal to grant the relief prayed in the supplemental pleading filed on the day of the trial by D. W. Standrod & Company, as Trustee, is without any merit.

A consideration of the pleading filed by Bowman, as Trustee in bankruptcy, against this supplemental pleading will convince the Court that there was no real ground for this application and that the facts did not justify the relief asked by the supplemental pleading, even though the trial Court in this action had power to grant such relief.

The record shows that the Trustee, in bankruptcy, had brought an action against the Utah Implement-Vehicle Company and that in such action after taking the testimony in British Columbia, of the bankrupt, the Trustee, in bankruptcy, and his attorneys were convinced that they had a very poor case; that the settlement made between the Trustee, in bankruptcy, and the Implement Company involved a claim of the Trustee to certain personal property which had been surrendered to the Implement Company by the Trustee, in bankruptcy, under claim of title; that the entire matter was submitted to the Court in the bankruptcy proceedings and the proposed

settlement approved by the Court and thereupon the Trustee dismissed the suit to set aside the alleged preference.

The showing by Bowman, as Trustee, in the record also makes it appear that the creditors claiming liens upon the Shelley property involved in this action, had not any of them filed general claims against the bankrupt estate, and also that the Trustee, in bankruptcy, had no interest of any value in that property because of the fact that the Rodgers mortgage and the mechanic's liens which had been foreclosed against the Trustee, in bankruptcy. amounted to more than the value of that property. The situation was simply that D. W. Standrod & Company, as Trustee on the date this case came on for trial, discovered that they could not, as they were seeking to do by their answer, raise the question of the plaintiff's mortgage being an unlawful preference and in order to promote their own interests, under their purchase of the Shelley property at foreclosure sale, they filed a supplemental pleading in this action seeking to have the Court in this action exercise powers that the Court would have in the bankruptcy proceedings, but not in this case, and seeking to require the Trustee, in bankruptcy, to repudiate a formal settlement which he had made, under the approval of the bankruptcy Court, and give up eight hundred dollars which he had received under that settlement and go into expensive litigation which he would have no hopes of winning and which could not result to his benefit at all.

It is not true, as stated in appellant's brief, that it was charged by the Trustee, in bankruptcy, in the complaint to set aside the preference, that the mortgage of Utah Implement-Vehicle Company was for four thousand dollars, or any sum whatever, in excess of Mickleson's indebtedness. The files in the bankruptcy proceedings and

in the preference suit and the deposition of Mickleson in the latter suit were offered in evidence at the hearing of this supplemental pleading but the same are not in the transcript of the record.

It is true that the Trustee, in bankruptcy, claimed that he had found by examination of the books of the Utah Implement-Vehicle Company, that the mortgage was taken for something like two thousand eight hundred dollars in excess of the debt due to the Implement Company, but that question was not involved in the suit to set aside the alleged preference, and the showing made by Bowman, as Trustee, is that the Implement Company denied this claim.

The showing on behalf of Bowman, as Trustee, also shows that the payment of eight hundred dollars was not alone in consideration of the dismissal of the suit to set aside the alleged preference, but that it was also in consideration of the settlement of all matters of difference between Bowman, as Trustee, and the Implement Company, and including the claim to the consigned goods which the Implement Company had retaken under its claim of title.

The matter of continuing or staying proceedings in this case was a matter largely in the discretion of the trial Court and the trial Court, after consideration of the application and the answer thereto and the files, deposition, and papers relating to the preference suit, and the bankruptcy proceedings, held that there was no merit in the application and denied the same. We submit that there was no abuse of its discretion by the trial Court.

It is well settled that a creditor cannot maintain a suit to set aside a preference, and that neglect or refusal of a trustee to bring or prosecute a suit to set aside a preference, does not entitle a creditor to maintain a suit in

his own name, but the proper remedy in such a case is an application to the bankruptcy Court to compel the Trustee to take requisite steps for the full and complete protection of the rights of the creditor.

Loveland on Bankruptcy (4th edition) Section 535.

Mr. Loveland states in said Section 535, "The Trustee will not be required to sue for property unless the estate is likely to be benefited by the suit."

The supplemental pleading of the appellant did not make any offer to furnish eight hundred dollars to the Trustee to refund to the Implement Company in the event the contract of settlement was repudiated nor did they in the application make any offer to bear the expense of prosecuting the suit to set aside the mortgage to the Implement Company as a preference.

We respectfully submit that the trial Court committed no error; that its judgment is a proper one, and that the same should be affirmed.

Respectfully submitted,

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